A. Intermodal Competition

None of the commenters seriously disputes the evidence regarding the growing availability and usage of intermodal alternatives to serve mass-market customers. Instead, they attempt to exclude consideration of these alternatives, first by inventing a market for "wireline" services provided over legacy network facilities such as circuit switches and copper loops, and then by claiming that the various intermodal alternatives do not belong in this market because they do not match legacy POTS service in every possible respect.[160] But this attempt to define a relevant product market narrowly cannot be squared with basic economic principles or with legal precedent.

As the Reply Declaration of economists Robert Crandall and Hal Singer explains, a rival mass-market voice technology does not need to be considered equal in quality by all potential customers, or even available to all potential customers, in order for that technology to constrain the pricing of ILEC voice services and, therefore, to be included in the same product market. *See* Crandall/Singer Reply Decl. ¶¶ 5-6 (Attachment H); *see also* Kahn/Tardiff Reply Decl. ¶ 24 (Attachment A); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). Rather, different services are considered to be part of the same product market so long as they are considered reasonably interchangeable by "marginal" consumers — that is, the subset of consumers who will switch between the services in the putative market in response to small changes in relative prices. *See* Crandall/Singer Reply Decl. ¶ 6.

Defining the market narrowly to include wireline POTS service, and instead allowing competing carriers to obtain unbundled access to the legacy network, also will discourage the use

[160] *See, e.g.*, MCI at 35, 86; Integra at 9-11; PACE *et al.* at 11; Sprint at 46-47; Momentum at 13.

of intermodal alternatives. Yet as Doctors Kahn and Tardiff explain, intermodal competition is precisely the kind of competition that should both be encouraged and expected in capital-intensive industries like telecommunications that are subject to rapid technological innovation. *See* Kahn/Tardiff Decl. ¶ 7; Kahn/Tardiff Reply Decl. ¶¶ 3, 20. Intermodal forms of competition offer consumers different packages of price, quality, and functionality that provide more meaningful competition than service that merely duplicates an incumbent's offerings. Kahn/Tardiff Decl. ¶¶ 8-9; Kahn/Tardiff Reply Decl. ¶ 6. Thus, just as trucks, barges, and planes emerged to compete with railroads — enabling companies relying on these new technologies, such as Federal Express and United Parcel Service, to compete with incumbents like the U.S. Postal Service — cable, wireless, and VoIP are now competing with the wireline telephone companies that were the mainstay of the industry in the past century. *See* Kahn/Tardiff Decl. ¶¶ 8-9; Kahn/Tardiff Reply Decl. ¶ 7. Attempts to ignore intermodal alternatives in order to "subsidize CLEC entry" is, as Doctors Kahn and Tardiff explain, a "hopeless" and "ultimately counterproductive" task that "will only distort and impede the development of efficient competition." Kahn/Tardiff Reply Decl. ¶ 7.

As demonstrated below, actual market experience since the time of the *Triennial Review* demonstrates that intermodal competition for voice services is thriving and is providing consumers a variety of options that were not available only a few years ago. Throughout the country, intermodal competitors such as cable companies, VoIP providers, and wireless companies are offering local voice services that are comparable in the mix of price, quality, and functionality to conventional circuit-switched service from the ILEC. These intermodal alternatives already are available to and are being used by a significant number of customers, and

therefore ensure that there will continue to be vibrant competition for mass-market customers regardless of whether competing carriers have access to unbundling switching and the UNE-P. In any event, the claims by some commenters regarding cable, VoIP, and wireless are, as discussed below, entirely misplaced.

1. Competition from Cable Operators

Verizon demonstrated in its opening comments that, since the time of the *Triennial Review* proceeding, the deployment of competing voice telephone services by cable companies has expanded exponentially as cable companies both increased the scope of their circuit-switched offerings and began aggressively to roll out VoIP service over their cable networks. Cable companies currently offer voice telephone service to approximately 15 percent of homes nationwide using circuit switches, and to millions of additional homes using VoIP, with plans to offer VoIP to approximately 24 million homes by the end of 2004, to more than 40 million by the end of 2005, and to more than 90 million by the end of 2006. *See 2004 Fact Report* at I-5, II-38 to II-39. Within Verizon's region alone, cable companies already offer voice telephone service in markets that reach more than 18 million homes, and have announced that they will offer service on a much wider basis by the end of this year. *See* Hassett/Woodbury Decl. ¶¶ 6, 18. As Verizon further demonstrated, and as the Crandall/Singer Reply Declaration confirms, consumers now perceive the mix of price, quality, and functionality of telephone services provided over cable networks to be fully competitive with traditional ILEC service, and a large and rapidly growing number of consumers are accordingly switching to these cable-based alternatives. *See* Verizon Comments at 106 & Hassett/Woodbury Decl. ¶¶ 48-49; *2004 Fact Report* at II-7 to II-8; Crandall/Singer Reply Decl. ¶¶ 26-30.

MCI and a few other commenters claim that the Commission should ignore competition from cable operators in the impairment analysis, but their arguments fail as a matter of law and facts. First, these commenters rely on the Commission's prior holding that cable networks are not open to all would-be competitors, and therefore do not serve as evidence that competition is possible from competitors seeking to use their circuit switches together with unbundled loops.[161] But as the D.C. Circuit's prior holdings make clear, the purpose of the Act is not to favor particular entry strategies or competitors, but "to stimulate competition — preferably genuine, facilities-based competition." *USTA II*, 359 F.3d at 576. Thus, when this Commission attempted to ignore cable-supplied alternatives in the broadband market using the same argument the commenters urge it to reinstate here, the D.C. Circuit concluded that its actions were "quite unreasonable" and taken with "naked disregard of the competitive context." *USTA I*, 290 F.3d at 429. The presence of such competition is sufficient, the Court explained, because it "means that even if all CLECs were driven from the . . . market, mass market consumers will still have the benefits of competition between cable providers and ILECs." *USTA II*, 359 F.3d at 582. And this is all the more true here given that competition also is available from multiple wireless providers and other intermodal alternatives as well.

Second, MCI claims (at 94) that cable telephony services "have not yet garnered a large number of customers." But the relevant question is not how many customers already subscribe, but how widely the service is or could be made available. *See USTA II*, 359 F.3d at 575. On that score, while MCI claims that cable is not yet "widely available," cable companies' circuit-switched service is already available to nearly 15 percent of U.S. homes, and their VoIP service

[161] *See* MCI at 93, 95; PACE *et al.* at 64.

is available to millions of additional homes and expanding rapidly. In Verizon's region alone, cable telephony — circuit switched and VoIP combined — is already available in markets that reach more than 18 million homes. Some major cable operators (such as Cablevision and Time Warner) already have deployed service to all or substantially all of their service territory; and all other major cable operators are in the process of doing the same. *See 2004 Fact Report* at II-6 to II-8.

While MCI also implies that consumers do not appear to be embracing these offerings, the facts show just the opposite. More than 15 percent of consumers that have access to circuit-switched service from their cable company have subscribed, with the totals as high as 45-55 percent in some of the markets where the service has been available the longest. *See id.* at II-38 to II-39. Cable operators are now reporting similar levels of success with their VoIP offerings. For example, in the first Verizon market in which Time Warner began providing VoIP service (Portland, Maine), it reports that 40 percent of its cable modem subscribers (and 14 percent of all homes passed for its cable voice) have already subscribed to Time Warner's VoIP service. *See id.* at II-8. As of mid-August 2004, Time Warner was signing up 1,200 customers a day (or some 36,000 customers per month) for VoIP service in its various markets. *See id.*; Hassett/Woodbury Decl. ¶ 21; Crandall/Singer Reply Decl. ¶ 28. Cablevision is adding an average of more than 3,400 VoIP subscribers per week (or more than 13,000 per month) in the New York and New Jersey metropolitan area where Cablevision now offers the service to all of its four-million homes passed. *See* Hassett/Woodbury Decl. ¶ 19; *2004 Fact Report* at II-7 to II-8; Crandall/Singer Reply Decl. ¶ 28.

Third, MCI argues (at 95) that, even assuming cable does provide a viable alternative, "it would at best result in a duopoly." That is clearly not true. For one thing, cable companies have committed to a policy of "network neutrality" that allows competitive packet-switch providers to provide their own voice services to cable subscribers, and as described below literally dozens of VoIP providers are now doing so nationwide. *See 2004 Fact Report* at II-2, II-5 to II-6, Table 2. AT&T has in fact entered into marketing agreements with four major cable operators (Comcast, Time Warner, Cox, and Adelphia) to facilitate AT&T's ability to provide its VoIP service over these operators' networks. *See id.* at II-9 to II-10. In addition to cable, competition is available from multiple wireless providers in every market and other intermodal alternatives as well. *See* Verizon Comments at 95.

Finally, a few commenters claim that the availability of cable modem service is limited for small business customers, although they provide no data to support this assertion.[162] Other commenters, however, admit that they face competition from cable in many small business markets. For example, Conversent claims that it faces competition from cable in competing for small business in Rhode Island (Cox), Maine (Time Warner), New Hampshire (Comcast), Connecticut (Cablevision, Cox), and New York (Cablevision).[163] Indeed, the record demonstrates that five of the six largest cable operators (which collectively represent approximately 90 percent of consumer cable modem subscribers) already offer broadband services tailored to small businesses, and these cable operators have acknowledged that they can readily reach most small-business customers with their existing infrastructure and that it makes

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[162] *See, e.g.*, Advanced Telcom's Wigger Decl. ¶¶ 30-32; XO's Tirado Decl. ¶¶ 30-32.

[163] *See* Conversent's Shanahan Decl. ¶¶ 35, 39, 45, 49-50, 56.

sense to serve them. *See 2004 Fact Report* at A-3 to A-5 & Table 3. Verizon also demonstrated that several studies — including a March 2004 study commissioned by the Small Business Administration that ALTS has praised as a "well- researched report" — found that cable modem was being used more often than DSL by small businesses with 0-4 employees, 5-9 employees, and those with revenues less than $200,000. *See id.* at A-3.[164]

2. Competition from VoIP providers

As Verizon explained in its opening comments, any customer who has access to cable modem or other broadband services also has access to competitive VoIP services from multiple providers, regardless of whether the cable companies themselves offer voice telephone service in a particular area. VoIP is either already available from or is now being deployed by a wide range of companies, including major long-distance companies, such as AT&T, other national VoIP providers, such as Vonage, and numerous other national or regional providers. *See 2004 Fact Report* at II-5 to II-12 & Table 2; Hassett/Woodbury Decl. ¶¶ 33-35, 40-45. These services can be provided over broadband connections that approximately 90 percent of all households (and more than 92 percent in Verizon's region) can now obtain from a provider *other than* the incumbent local telephone company, principally cable modem service. *See 2004 Fact Report* at II-2.

A number of commenters claim that the Commission should ignore VoIP competition, but their arguments again fail on both the law and on the facts. First, several commenters claim that VoIP competition should be ignored for the same reason they say competition from cable

[164] *See also* S. Pociask, Telenomic Research, LLC, *A Survey of Small Businesses' Telecommunications Use and Spending* (Mar. 2004); ALTS Press Release, *ALTS Applauds SBA's Survey of Competition for Small Business Customers* (Mar. 11, 2004).

should be ignored — that VoIP does not provide evidence that intramodal competition using circuit switches and unbundled loops is possible.[165] But as described above, whether such intramodal competition is possible is irrelevant as a legal matter in the wake of *USTA I* and *II*.

Second, several commenters claim that VoIP is too expensive compared to traditional wireline service when the cost of a broadband connection is taken into account.[166] But none of these commenters performs a serious economic analysis that takes into account all the revenues and costs of the respective services, or the fact that many customers purchase multiple services that a broadband connection with VoIP replaces. As Verizon demonstrated, when such an analysis is performed, the price of VoIP services is comparable for most users, even when the cost of the broadband connection is taken into account. *See 2004 Fact Report* at II-17, Table 4, II-19 & Table 5, App. B; Hassett/Woodbury Decl. ¶ 42.[167] Moreover, 25 percent of all households *already* subscribe to broadband (and 40 percent will by year-end 2005), and for these customers there is no *incremental* cost of adding broadband. *See* Hassett/Woodbury Decl. ¶ 42. And the price of VoIP services continues to fall. In fact, EarthLink has just announced that it

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[165] *See, e.g.*, MCI at 98-99; PACE *et al.* at 14-15; ALTS *et al.* at 42-44.

[166] *See, e.g.*, MCI at 99; ALTS *et al.* at 42-44; PACE *et al.* at 16-17. Although MCI claims (at 94) that at least one cable operator (Cablevision) requires VoIP service to be purchased together with broadband or video, that is simply not true at least with respect to some cable operators — both Cox and Time Warner, for example, offer IP telephony services on a stand-alone basis in at least some of their markets. *See 2004 Fact Report* at II-20.

[167] MCI claims (at 99-101) that VoIP plus broadband "can be" more expensive than traditional offerings, but performs absolutely no analysis to demonstrate this is the case. MCI instead cites (at 101 n.294) to Verizon's $49.95 Freedom Package and notes that VoIP packages typically costs $20 to $40 not including broadband. But most consumers either already subscribe to broadband, or to dial-up Internet access, and when that is factored into the analysis, together with the fact that taxes and fees for VoIP service are much lower, prices are comparable. *See 2004 Fact Report* at II-18 to II-20.

would begin offering free VoIP service to all of its 1.2 million broadband subscribers.[168] Vonage offers an unlimited local and long-distance package for only $24.99 per month, having recently cut its prices by $5 per month in response to AT&T's $5 price decrease. Hassett/Woodbury Decl. ¶¶ 42, 45; Crandall/Singer Reply Decl. ¶ 32. And AT&T has even more recently introduced a new VoIP plan offering unlimited local service for $19.99 per month, with local toll and long-distance calling to the U.S. and Canada billed at 4 cents per minute.[169] Crandall/Singer Reply Decl. ¶ 32.

Third, MCI asserts (at 99-100) that "it is not likely" that VoIP will be widely purchased by many mass-market customers in the near future, citing a single consumer survey showing that only 17 percent of Americans had heard of VoIP. But familiarity with the underlying technology used to provide a service is apropos of nothing: Would the survey results really be any different if consumers were asked about the circuit switches, digital loop carriers, multiplexers, and cross connects used to provide traditional POTS? In any case, MCI's claim is at odds with the fact that so many of the nation's telecommunications providers have now decided to begin serving mass-market customers using VoIP. *See 2004 Fact Report* at II-5 to II-12 & Table 2.[170] These companies are pouring millions worth of investment behind the technology and its marketing based on the belief that consumers do not care what the underlying technology is, just so long as it offers a true competitive alternative. And on that score, there is widespread agreement that

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[168] EarthLink Press Release, *EarthLink Launches Free VoIP Service* (Oct. 5, 2004).

[169] *See* AT&T News Release, *AT&T Introduces New Residential VoIP Plan* (Oct. 14, 2004).

[170] Moreover, the *2004 Fact Report* notes that there have been a number of consumer surveys, including a recent Gallup Poll, that confirm there is very high consumer interest in VoIP, with much higher percentages of consumers expressing interest in the technology and willingness to switch than MCI claims. *See 2004 Fact Report* at II-8 & n.20.

VoIP does in fact compete directly with traditional service. *See 2004 Fact Report* at I-8, I-11 & Table 8.[171] For precisely this reason, Wall Street analysts are unanimous in the view that VoIP services will in fact attract millions of subscribers over the next two years. *See 2004 Fact Report* at I-12, Table 9.[172] Vonage alone is on track to acquire 1 million subscribers by the summer of 2005, and AT&T has announced a similar goal.[173]

Wall Street is likewise of the view that competition from VoIP, together with competition from other intermodal alternatives, will fully replace the effect of UNE-P on the ILEC's bottom line. *See 2004 Fact Report* at I-4 & Table 3, I-11 & Table 8.[174] This is fully consistent with

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[171] *See also* D. Barden, *et al.*, Banc of America Securities, *Telecom Services and the 2004 Election* at 6 (Sept. 29, 2004) ("Heading into 2005, the chief concern overhanging the Bell companies is their long-term exposure to technological substitution via VoIP (among other things), particularly as delivered by cable companies."); G. Miller, *et al.*, Fulcrum Global Partners, *Wireline Communications: Will Voice Ever Be Free?* at 1 (Oct. 6, 2004) ("VoIP penetration and resulting RBOC market-share loss remains one of our greatest concerns for RBOCs heading into 2005. . . "); D. Barden, *et al.*, Banc of America Securities, *3Q04 Results Heads Up* at 4 (Oct. 12, 2004) (noting "the accumulating momentum of cable company VoIP telephony operations" as a "very dark cloud on the horizon for Bell stocks"); C. Larsen, *et al.*, Prudential Equity Group, LLC, *Tough Business Conditions, Low Valuation – We Initiated Coverage at Neutral Weight* at 8 (Oct. 6, 2004) (noting "the threat VoIP presents to the RBOCs" and that "VoIP greatly diminishes the importance of the local loop.").

[172] *See also* V. Shvets *et al.*, Deutsche Bank, *3Q04 Preview: Déjà Vu* at 1 (Oct. 12, 2004) ("by mid-2005, RBOCs could be losing 300k+ lines per quarter to cable telephony").

[173] *See* M. Stump, *Vonage Hits the Shelves; VoIPer Adds Retail To Keep Up Growth*, Multichannel News at 63 (Oct. 11, 2004); AT&T News Release, *AT&T's CallVantage Service Expands To Serve the Western United States* (May 17, 2004), *available at* http://www.att.com/news/item/0%2C1847%2C13064%2C00.html.

[174] In fact, some analysts believe the Bell companies could end up considerably worse off. *See, e.g.*, S. Flannery, *et al.*, Morgan Stanley, *The Death of UNE-P: Not Without Risks* at 1 (Oct. 15, 2004) ("While the transition from UNE-P represents an opportunity for the Bells to generate incremental revenue, the transition could also potentially result in lower net revenue if the Bells don't win the majority of UNE- lines and/or if they are forced to lower local ARPUs. Potential competition from CLECs, wireless, and VoIP will put pressure on the Bells over the next few years as they attempt to win UNE-P customers and maintain ARPUs, in our view.").

Verizon's experience. As Verizon demonstrated, although competing carriers have significantly curtailed their purchases of UNE-P lines, Verizon continued to lose retail residential lines at roughly the same rate as before this trend began, and this is due primarily to competition from cable, VoIP, and wireless. *See* Lataille Decl. ¶ 19 & Exh. 4.

Finally, MCI and others also claim that VoIP "is subject to a number of quality limitations that do not apply to traditional landline calling."[175] But as explained above, even assuming that these new services are not identical to traditional POTS in every respect, it does not mean that they do not compete or that they do not have the ability to discipline prices for those traditional services. And the facts show that this is exactly what is happening — the majority of new VoIP customers are using it as their primary line. *See 2004 Fact Report* at II-25. For example, some 50 percent of Vonage's subscribers and 86 percent of Time Warner's Digital Phone subscribers reportedly bring their old phone number with them when they sign up,[176] and while Cablevision still markets its service as a second-line replacement it reports that more than a third of its customers use the existing service as primary line service anyway.[177]

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[175] MCI at 101; *see also* ALTS *et al.* at 43; PACE *et al.* at 16-17.

[176] *See* C. Moffett, *et al.*, Bernstein Research Call, *Cable and Telecom: Bernstein Study Finds Consumers Ready and Willing To Switch to Cable Telephony* at 4 (Dec. 9, 2003) ("80-90% of Time Warner's Portland customers in Portland are opting to keep their existing number"); *see also* G. Britt, Chairman & CEO, Time Warner Cable, Presentation to UBS Media Week Conference (Dec. 11, 2003).

[177] *See* C. Moffett, *et al.*, Bernstein Research Call, *Cable and Telecom: Bernstein Study Finds Consumers Ready and Willing To Switch to Cable Telephony* at 4 (Dec. 9, 2003) (Cablevision is currently marketing its service as a second line for regulatory reasons); G. Campbell, *et al.*, Merrill Lynch, *3Q03 Broadband Update: The Latest on Broadband Data and VoIP Services in the U.S. and Canada* at 15 (Nov. 3, 2003) (at least 37 percent of Cablevision's subscribers have disconnected all other landline service).

In any event, while MCI claims (at 101) that VoIP suffers from "uneven sound," MCI's own website admits that its possible to provide VoIP so that "[t]he quality is comparable to regular Public Switch Telephone Network (PSTN) service," with "Excellent voice quality for every call."[178] And other service providers, independent analysts, and Chairman Powell have all made the same findings. *See 2004 Fact Report* at II-11, II-20 to II-21 & Table 6, II-23.[179]

MCI also claims (at 103) that VoIP cannot be obtained with back-up power, but some providers (like Cox) do in fact already make battery back-up power available, while others (like Cablevision) plan to, and the costs of doing so are estimated at only $50 per subscriber and are projected to fall to $10-$20 within 18-24 months. *See 2004 Fact Report* at II-13 & II-26, Table 7. VoIP providers also have adopted alternative 911 capabilities while the industry works towards making E911 service available. *See id.* at II-24; MCI at 103. Vonage has just

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[178] *MCI Advantage: FAQs, at* http://global.mci.com/us/enterprise/voice/connection/faq/.

[179] MCI also claims (at 101) that VoIP phone numbers are not available for directory listings and that 411 dialing often is not available. But MCI fails to explain how such limitations, even if real, make any difference in an impairment analysis. In any case, MCI is incorrect. Many VoIP providers — including Vonage, Time Warner, and Cox do offer directory listings. *See* Vonage, *Learning Center: Will I Still Be Listed in the Phone Book?, at* http://www.vonage.com/help_knowledgeBase_article.php?article=287; Time Warner Cable, *Popular Calling Features, at* http://www.timewarnercable.com/corporate/products/digitalphone/popularfeaturesdigitalphone.html; Cox, *Digital Telephone: Frequently Asked Questions (FAQs), at* http://www.cox.com/support/roanoke/telephone/telephonefaq.asp. Likewise, these VoIP providers also provide directory assistance (*i.e.*, 411 service). *See Enhanced 411 Dialing, at* http://www.vonage.com/features.php?feature=41. Time Warner Cable, Cox, and Vonage also provide directory assistance. *See* Time Warner Cable, *Benefits and Features, at* http://www.timewarnercable.com/corporate/products/digitalphone/benefitsphonepage.html; Cox, *Digital Telephone: Frequently Asked Questions (FAQs), at* http://www.cox.com/support/roanoke/telephone/telephonefaq.asp; Vonage, *Enhanced 411 Dialing*, http://www.vonage.com/features.php?feature=41; *see also* D. Pogue, *From Cablevision, Another Way To Carry Your Voice*, N.Y. Times, Apr. 8, 2004, at G-7 ("dialing 411 and 911 work just as they do on Baby Bell lines, except that the 411 calls are free").

announced that it has developed E911 capabilities that it will be implementing in Rhode Island "soon," and in other markets as it completes tests with local 911 centers.[180] Finally, it is necessary to take into account that VoIP offers many features and functionality that traditional POTS cannot match, and providers and analysts expect many consumers to switch to VoIP on that basis alone. *See 2004 Fact Report* at II-26 to II-27.[181]

3. Competition from Wireless Providers

As Verizon demonstrated in its opening comments, wireless service is another intermodal alternative that competes directly with landline telephone service, both for local access lines, and even more extensively for local and long-distance calls, and therefore provides further proof that competing carriers are not impaired without access to unbundled mass-market switching. Service from multiple wireless carriers is available throughout Verizon's region, and throughout the country. *See* Hassett/Woodbury Decl. ¶ 10 & Exh. 2; *2004 Fact Report* at II-31 to II-32 & Table 9. The number of wireless subscribers has grown from 129 million to 161 million since the *Triennial Review*, while the number of wireline access lines has declined. *See 2004 Fact Report* at II-28; Hassett/Woodbury Decl. ¶ 51. During that same period, the percentage of wireless users that have given up wireline service has grown from 3-5 percent to 7-8 percent, and

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[180] Vonage Press Release, *R.I. E911 Call Leads To Company's Answer* (Oct. 14, 2004), *at* http://www.vonage-forum.com/article1257.html.

[181] *See, e.g.*, D. Barden *et al.*, Banc of America Securities, *Straight Talk on VoIP: Initial Takeaways From Our Seminar on VoIP Business Models* at 1 (Apr. 15, 2004) ("Providers uniformly stressed that it isn't only about price and consumers will ultimately be equally attracted by advanced features."); R. Talbot, *et al.*, RBC Capital Markets, *Canadian Telecom Services: Battle for the Broadband Home* at 7 (Jan. 27, 2004) ("we believe that there may be a greater willingness among consumers to accept a non-powered approach with modestly lower reliability than the traditional wireline service in return for lower pricing and innovative features.").

approximately 2.7 million additional wireless subscribers are giving up their wireline phones each year. *See 2004 Fact Report* at II-28 to II-29; Hassett/Woodbury Decl. ¶ 53. About 14 percent of subscribers now use their wireless phone as their primary phone. *See 2004 Fact Report* at II-30; Hassett/Woodbury Decl. ¶ 53. And still greater amounts of traffic are migrating to wireless networks — nearly 30 percent of all voice minutes, and 43 percent of all long distance minutes, according to independent analysts. *See 2004 Fact Report* at II-30; Hassett/Woodbury Decl. ¶¶ 56-57; *see also* Crandall/Singer Reply Decl. ¶¶ 11-16.

None of the commenters disputes these facts regarding the availability and usage of wireless. Nor do any dispute that wireless is comparable to wireline service with respect to price. Indeed, Verizon demonstrated that, even before taking into account the added value of mobility, wireless prices are generally lower than wireline prices for the average user. *See 2004 Fact Report* at II-17, Table 4 & II-31. MCI nonetheless claims (at 89) that "wireless service generally does not provide the quality of service that wireline customers have come to expect." But as described above and in the Crandall/Singer Reply Declaration, that is simply not the relevant question from an economic point of view. The question, instead, is whether the combination of price and quality offered by wireless allows it to compete with wireline, and neither MCI nor any other commenter even attempts to demonstrate that, under that standard, wireless fails to provide direct competition to wireline for a large and growing number of customers today. Indeed, as the Crandall/Singer Reply Declaration explains, the massive migration of traffic minutes from wireline to wireless networks demonstrates that both consumers and suppliers of voice services "perceive wireless and wireline service as alternatives,

and supports our conclusion that the pricing of wireless minutes constrains the pricing of wireline voice service." *See* Crandall/Singer Reply Decl. ¶ 16.

Independent analysts likewise find that wireless "has gained a general level of acceptance among consumers. Consumers appear to be more willing to accept a modest reduction in the level of reliability in return for other benefits (especially low price, and improved convenience)."[182] A recent survey by J.D. Power and Associates confirms that "[o]verall satisfaction performance with wireless service providers has increased 5 percent over 2003," and that satisfaction with call quality increased by 7 percent during that same period.[183] The record also demonstrates that wireless providers are continuing to improve their network coverage and quality each year as competition among wireless providers intensifies. *See 2004 Fact Report* at II-34.[184]

MCI nonetheless cites a Commission finding from the *Triennial Review Order* — which in turn relied on an unsupported assertion in one of AT&T's briefs — that wireless service is

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[182] R. Talbot, RBC Markets, *Battle for the Broadband Home* at 7 (Jan. 27, 2004); *see 2004 Fact Report* at II-33 to II-35.

[183] J.D. Power and Associates Press Release, *J.D. Power and Associates Reports: Satisfaction with Wireless Service Providers Increases Significantly as Customers Report Higher Ratings in Call Quality and Cost-Related Attributes* (Sept. 9, 2004).

[184] Although MCI claims (at 92) — again without anything in the way of evidentiary support — that wireless networks do not have the capacity to provide the quantity of service typically demanded by wireless users, this claim is hard to take seriously given that, since the 1996 Act alone, the number of subscribers using these networks has grown four-fold (from 34 million to more than 148 million) while the amount of traffic on these networks has grown more than seventeen-fold (from 51 billion to 900 billion minutes). *See* Crandall/Singer Reply Decl. ¶ 8, Table 1. Moreover, to the extent there is a constraint on wireless network capacity, the Commission can address this directly by licensing additional spectrum; it cannot use this as an excuse for finding impairment.

engineered to provide a roughly 70 percent call completion rate.[185] But according to an industry survey conducted by the General Accounting Office, the "industry standard" is now a "98 percent call-completion rate."[186] And, while MCI cites (at 90) a 2003 National Regulatory Research Institute survey purporting to find that customers are dissatisfied with wireless service, that survey merely finds 28 percent of customers were dissatisfied with their service *provider* — not necessarily the service itself. According to that same survey, only about a fifth of customers complained about dropped calls or static or line noise. *See* MCI at 90.

B. Competition from Carriers Using Their Own Circuit Switches

1. Verizon demonstrated in its opening comments that competing carriers also can use their own circuit switches to provide competitive voice telephone service to the mass market without using incumbent carriers' unbundled switching. Verizon explained, however, that this form of competition has been overtaken by the intermodal alternatives described above, which are more economical and also provide competing carriers more ability to differentiate their service offerings from the incumbent's. The evidence of intermodal competition is now so compelling that there is not a single commenter that states that it plans to serve any significant number of mass markets going forward using its circuit switches together with unbundled loops.

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[185] *See* MCI at 89-90 (citing *Triennial Review Order* ¶¶ 230 n.702, 445 (citing AT&T Reply at 25, 162-63)).

[186] General Accounting Office, *FCC Should Include Call Quality in Its Annual Report on Competition in Mobile Phone Services* at 22, Report No. GAO-03-501 (Apr. 2003) ("While carriers did not provide us with detailed information on blocked and dropped calls, network officials at two carriers said that their goal was to have a 98 percent call-completion rate. . . . These officials and those at other carriers said that 98 percent is generally the industry standard.").

To the contrary, AT&T has abandoned its UNE-P strategy entirely, and has no plans to convert its embedded base to its own switches. MCI, the nation's second largest UNE-P provider, informs the Commission that while it once entertained a plan to convert its UNE-P customers to its own switches on a very small scale (involving only 700 central offices nationwide), it has already decided several months ago to put that plan "on indefinite hold." MCI's Huyard Decl. ¶ 13.[187] As for the other UNE-P providers, they are merely seeking to preserve UNE-P as an end in itself,[188] which completely defeats the purpose of the Act to promote facilities-based competition.

2. Although the evidence demonstrates that no carriers are interested in converting from UNE-P to their own switches in light of the intense intermodal competition that already characterizes the market, the evidence also shows that they have the ability to do so. The Commission's own data show that carriers are serving approximately 3 million mass-market lines nationwide using their own circuit-switches together with unbundled loops, plus another 3.2 million lines through circuit-switched cable telephony. *See 2004 Fact Report* at II-42. Competing carriers are serving mass-market customers using their own switches in 137 of the top 150 MSAs, and are serving wire centers accounting for 85 percent of the population in those MSAs. *See id.* As Verizon demonstrated in its opening comments, competing carriers have used their circuit switches to serve mass-market customers extensively throughout each of Verizon's

[187] Although MCI contends that it would not have been economical to use its circuit switches and unbundled loops to serve customers, the Reply Declaration of Jeffrey Rohlfs and Joseph Weber demonstrates that such a strategy would in fact be profitable. *See* Rohlfs/Weber Reply Decl. ¶¶ 3-4 & Exh. 1.

[188] *See, e.g.*, PACE *et al.* at 3, 52.

top-50 MSAs. *See* Verizon Comments at 104-05 & Lataille Decl. ¶¶ 8-9; Attach. O at Maps D.[189]

Although MCI claims that this entry strategy is not profitable, the study on which it relies is flawed.[190] As the Report attached to the Reply Declaration of Jeffrey Rohlfs and Joseph Weber explains, replacing just a few of MCI's assumptions regarding the costs and revenues of this mode of entry with more reasonable assumptions based on actual market conditions shows that providing service using circuit switches together with unbundled loops is potentially profitable. *See* Rohlfs/Weber Reply Decl. Exh. 1 (Attachment I). So the results produced by the study are readily manipulable depending on the assumptions, and it therefore proves nothing. Regardless, even if in fact it would make little business sense to pursue entry using unbundled loops in view of the extensive intermodal competition in the market, that merely reinforces the fact that there is no impairment in this market.

3. MCI and several other commenters propose various tests for the Commission to evaluate competition in the provision of mass-market voice services, but these tests improperly exclude intermodal competition from the analysis, and also contain numerous additional flaws

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[189] Some commenters criticized the data Verizon submitted in state proceedings, but those criticisms have no relevance to the data that Verizon has submitted here. For example, the Pennsylvania Office of Consumer Advocate questions (at 7) whether Verizon had identified government lines as mass-market lines in its state filing for the Harrisburg MSA. The answer is no. The lines in questions were identified by a competing carrier during discovery in that state's proceeding, but were not included in the data Verizon submitted to the Commission here. Similarly, MCI claims that, in the California state proceedings, Verizon identified competing carriers as serving the mass market if they served only one mass-market line in the MSA. *See* MCI's Murray Decl. ¶ 17. In Verizon's data submitted to the FCC, each competing carrier identified by Verizon served at least 100 mass-market lines in the MSA. *See* Lataille Decl. Ex. 2.

[190] *See* MCI at 74-76 & Pelcovits Decl. ¶¶ 52-108.

that fly in the face of the D.C. Circuit's prior holdings. For example, MCI would have the Commission justify the perpetuation of the UNE-P by adopting a standard that requires at least *three* alternative providers — not including intermodal providers — in *each individual wire center* and only so long as each of those competitors is serving 1 percent or more of the residential customers in that wire center and is making its service available to the all of the remaining 99 percent.[191] Several other commenters argue that the Commission should permit access to unbundled switching and the UNE-P in a wire center for a particular UNE-P provider until the UNE-P provider acquires some number of customers within that wire center.[192] These tests fail for multiple reasons.

First, the D.C. Circuit has made clear that the impairment inquiry turns on whether competition is "possible," not whether it actually exists, and by insisting on evidence of multiple facilities-based providers, MCI and other commenters wrongly focus on whether individual markets are already fully competitive. Second, these proposed tests would require the Commission separately to analyze each individual market in isolation without drawing any inferences from evidence of deployment in analogous markets. But as the D.C. Circuit found with respect to transport, the Commission cannot "simply ignore facilities deployment along similar routes when assessing impairment." *USTA II*, 359 F.3d at 575. That same reasoning applies here.

[191] *See* MCI at 82-86, 116-20.

[192] ALTS *et al.* at 92; PACE *et al.* at 75-76.

Finally, each of the tests the commenters propose rest on the notion that each individual wire center constitutes its own relevant market,[193] even though the commenters fail to provide even a shred of empirical evidence that CLECs enter the mass-market on a wire-center basis or that it would be efficient to do so. As Doctors Kahn and Tardiff explain, given the rise of intermodal alternatives that belong in the product market, the proper geographic market is nationwide. *See* Kahn/Tardiff Decl. ¶¶ 14, 16; Kahn/Tardiff Reply Decl. ¶ 34. And as described above, defining a nationwide market here is consistent with Commission precedent adopting a national market definition for long-distance service based on similar evidence about the manner in which competition occurs. *See LEC Classification Order* ¶ 66; *Competitive Carrier Order* ¶ 30.

In any event, even if the Commission were to ignore intermodal competition, the proper geographic market would still be at least the metropolitan area, because that is the basis on which CLECs deploy their own switches and compete. *See* Kahn/Tardiff Decl. ¶¶ 14, 16; Kahn/Tardiff Reply Decl. ¶¶ 24, 31.

4. Finally, the record establishes that previous concerns regarding the hot-cut process are a thing of the past, and in any event the D.C. Circuit's decision in *USTA II* precludes the Commission from using perceived problems with the hot-cut process as a basis for finding impairment in the provision of mass-market switching.

As an initial matter, and as demonstrated above, the record establishes that competing carriers have no plans to migrate UNE-P lines to their own circuit switches, and instead plan to compete for mass-market customers using new modes of entry such as VoIP. As a result, it is

[193] *See* MCI at 35.

unlikely that Verizon will see any material increase in the demand for hot cuts. But even assuming that such demand were likely to materialize, the Commission is not permitted to use speculative concerns about the Bell companies' ability to handle it as a basis for finding impairment. As the D.C. Circuit held, to the extent there are concerns about the hot-cut process, the Commission must address them directly using "a narrower alternative" to unbundling that has "fewer disadvantages." *USTA II*, 359 F.3d at 571.

In any event, in the wake of the *Triennial Review Order*, Verizon has developed a new batch hot-cut process that has been approved by the New York PSC — one of the most stringent regulatory commissions in the country and a pioneer in developing hot-cut procedures. As Verizon demonstrated, its hot-cut processes will be able to handle the volumes that could be anticipated in an environment in which competing carriers no longer can obtain access to unbundled mass-market switching. *See* Verizon Comments at 113 & Maguire Decl. ¶ 37. The New York PSC specifically concluded that Verizon "could scale up its hot cut activities," even assuming that "Verizon will be required to increase its hot cut activity dramatically."[194] Moreover, the Reply Declaration of Thomas Maguire explains that, contrary to the claims of some commenters, Verizon's hot-cut processes use the most efficient technology currently available, and already have the capabilities to provide the kinds of hot cuts that competing carriers have claimed they want — such as hot cuts of loops between competing carriers; hot cuts of loops that carry both voice traffic and data traffic through either line sharing or line splitting

[194] *See* Order Setting Permanent Hot Cut Rates, *Proceeding on Motion of the Commission to Examine the Process and Related Costs of Performing Loop Migrations on a More Streamlined (e.g., Bulk) Basis*, Case 02-C-1425, at 59, 62 (N.Y. PSC Aug. 25, 2004) ("*NYPSC Hot Cut Order*").

arrangements; and hot cuts of loops to EEL arrangements. *See* Maguire Reply Decl. ¶¶ 10-16 (Attachment G).[195]

Although some object to the fact that IDLC-equipped loops are not eligible for Verizon's batch hot-cut process, this is not a valid concern. As Verizon has explained, before a customer served by an IDLC-equipped loop can be cut over to a competing carrier, the customer must be shifted from an IDLC-equipped loop to an all-copper loop or to a loop served via Universal Digital Loop Carrier ("UDLC") technology (which, unlike IDLC, can be unbundled in the central office). *See* Maguire Decl. ¶ 47; Maguire Reply Decl. ¶¶ 18-19. While about 16 percent of Verizon's lines are equipped with IDLC technology, more than 99 percent of those lines are served by distribution terminals that have copper or UDLC loops available, which means that Verizon can cutover those lines to a competing carriers' own switch. *See* Maguire Reply Decl. ¶ 23. But because of the considerable additional work required, these kinds of hot cuts are not eligible for the new batch process. *See* Maguire Decl. ¶ 29; Maguire Reply Decl. ¶ 17. Verizon can, however, cutover lines served by IDLC technology on a bulk basis through its basic hot cut process. *See* Maguire Reply Decl. ¶¶ 17, 24. And Verizon does so within the same intervals used for basic hot cuts (five business days). *See id.* ¶ 21.[196]

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[195] There is no reason to require testing of Verizon's batch hot-cut process as suggested by some competing carriers. Verizon's batch hot-cut process was developed from Verizon's basic and large job hot cut processes which have successfully cutover thousands of lines with exemplary performance. *See* Maguire Reply Decl. ¶ 45. If competing carriers would like to conduct a trial of Verizon's batch hot-cut process, Verizon is willing to do so, as it has already conducted such trials with a number of competing carriers. *See id.* ¶ 46.

[196] Although MCI argues (Starkey/Morrison Decl. ¶ 69) that IDLC-equipped loops served using GR-303 technology should be unbundled by allowing multiple carriers to the GR-303 system (*i.e.*, "multihosting"), the NYPSC examined MCI's multihosting proposal and concluded that it is "problematic" and "poses significant difficulties." *NYPSC Hot Cut Order* at 23, 24. As the Maguire Reply Declaration explains, that approach would require partitioning of control,

IV. STATE COMMISSIONS HAVE NO AUTHORITY UNDER FEDERAL OR STATE LAW TO IMPOSE OR ENFORCE UNBUNDLING REQUIREMENTS WHERE THE COMMISSION HAS NOT FOUND IMPAIRMENT

Verizon has demonstrated that state commissions, at the urging of CLECs, have asserted authority to mandate unbundling regardless of whether the Commission has found impairment and to regulate the rates, terms, and conditions on which BOCs provide 271 elements, including to mandate that BOCs provide such elements at TELRIC rates. These assertions of authority are contrary to the 1996 Act, binding judicial precedent, and the Commission's own construction of § 251 and § 271. The Commission should reject the position that CLECs and state commissions take here and should make certain that there is no doubt that federal law preempts any state commission decisions either imposing UNE obligations where this Commission has not or purporting to regulate BOCs' provision of 271 elements.

A. State Commissions Have No Authority Under Federal or State Law To Impose UNE Obligations Where This Commission Has Not Found Impairment

The Supreme Court and the D.C. Circuit have made clear that it is the Commission's responsibility under the 1996 Act to determine which network elements must be provided as UNEs. *See Iowa Utils. Bd.*, 525 U.S. at 391-92; *USTA II*, 359 F.3d at 565, 568. And, as explained above, under the federal standard that Congress established to govern unbundling, there must be a valid finding of impairment — a finding that only the FCC is empowered to make — *before* an incumbent is required to provide any network element as a UNE. When the

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security, provisioning, and testing functions, as well as other measures that would prevent carriers from inadvertently or intentionally interfering with each others' services. *See* Maguire Reply Decl. ¶ 28. Yet Verizon is not aware of any GR-303 equipment — much less one supported by industry-wide standards bodies — that would address these issues. *See id.* And in any event, GR-303 technology has not been deployed widely throughout Verizon's service territory. *See id.* ¶ 29.

Commission undertakes that task and either does not find impairment or does not impose an unbundling obligation — whether because it finds that any sources of impairment can be addressed directly or that the costs of unbundling outweigh any benefits — such a decision, as the Commission explained to the D.C. Circuit, "reflects a 'balance' struck by the agency between the costs and benefits of unbundling that element."[197] A decision by a state commission to impose an unbundling requirement where the Commission has not done so would therefore be one that "str[uck] a different balance," reflecting, for example, a different weighing of the evidence of impairment or of the costs of unbundling.[198] But that different balance would necessarily conflict with the Commission's determination. Because Congress, recognizing that it is not the case that "more unbundling is better," *USTA I*, 290 F.3d at 425, specifically designated the Commission as the entity to strike the appropriate balance between the costs and benefits of unbundling, such a state commission decision would therefore "conflict with federal law, therefore warranting preemption."[199] *See Geier v. American Honda Motor Co.*, 529 U.S. 861, 872, 881 (2000); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 155 (1982). For these reasons, as some state commissions have acknowledged, where the Commission has not found impairment or otherwise declined to require unbundling, "[s]tate mandated unbundling . . .

[197] Brief for the FCC at 93, *USTA v. FCC*, Nos. 00-1012, *et al.* (D.C. Cir. filed Jan. 16, 2004).

[198] *Id.*

[199] Brief for the FCC at 93, *USTA v. FCC*, Nos. 00-1012, *et al.* (D.C. Cir. filed Jan. 16, 2004).

would not be 'merely' inconsistent with the federal rules in their current form, but would be contrary to them."[200]

Other state commissions, however, claim to have authority to require incumbents to provide UNEs at TELRIC rates regardless of the Commission's determinations on the subject. *See* Verizon Comments at 118-19 (citing state commission decisions imposing such unbundling requirements); *see also* Arizona at 4-7; Minnesota at 1; New Jersey at 12-13; Pennsylvania at 3-4. The Commission rejected such claims in the *Triennial Review Order*, holding that states may not "impose any unbundling framework they deem proper under state law, without regard to the federal regime." *Id.* ¶ 192. The Commission held further that, if a state commission "were to require the unbundling of a network element for which the Commission has either found no impairment . . . or otherwise declined to require unbundling on a national basis," it would be "unlikely that such [a] decision would fail to conflict with and 'substantially prevent' implementation of the federal regime." *Id.* ¶ 195. The D.C. Circuit found challenges to that determination unripe, but strongly signaled that it agreed with the Commission.[201] To provide

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[200] Order Dismissing Remaining Issues, *Investigation by the Department on its Own Motion as to the Propriety of Rates and Charges Set Forth in M.D.T.E. No. 17, Filed with the Department by Verizon New England, Inc. d/b/a Verizon Massachusetts on May 5 and June 14, 2000, To Become Effective October 2, 2000*, D.T.E. 98-57, at 15 (Mass. DTE Jan. 30, 2004); *see id.* at 16-17; *see also* Order Dismissing Petitions, *Petition of the Competitive Carrier Coalition for an Expedited Order that Verizon Virginia Inc. and Verizon South Inc. Remain Required to Provision Unbundled Network Elements on Existing Rates and Terms Pending the Effective Date of Amendments to the Parties' Interconnection Agreements; Petition of AT&T Communications of Virginia, LLC, and TCG Virginia, Inc. For an Order Preserving Local Exchange Market Stability*, Case Nos. PUC-2004-00073 & PUC 2004-00074, at 6 (Va. SCC July 19, 2004) ("no unbundling can be ordered in the absence of a valid finding by the FCC of impairment under 47 U.S.C. § 251(d)(2)").

[201] *See USTA II*, 359 F.3d at 594; Transcript of Oral Argument at 84, *USTA II*, Nos. 00-1012, *et al.* (D.C. Cir. Jan. 28, 2004) (Question to counsel for NARUC: "Do you really want

the certainty necessary for investment and commercial negotiations, the Commission should reaffirm here, in no uncertain terms, that state commissions *cannot* require incumbents to provide UNEs where this Commission has not imposed any such requirement.

AT&T offers the most extensive defense of state commission assertions of authority to require unbundling where the Commission has not. *See* AT&T at 187-96. But none of its arguments undermine the conclusion that the Commission reached in the *Triennial Review Order* and defended before the D.C. Circuit. AT&T begins by pretending that the Eighth Circuit held in 1997 that the requirements imposed by the 1996 Act "set a 'floor below which . . . [a state] may not go.'" *Id.* at 187-88 (quoting *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 812 (8th Cir. 1997) (subsequent history omitted)) (alteration and omission in original). In fact, the Eighth Circuit held that § 251(c)(*2*) "establishes a floor below which the quality of interconnection may not go" and, moreover, precludes the Commission from mandating that incumbents provide a higher quality of interconnection. *Iowa Utils. Bd.*, 120 F.3d at 812. The court's reference to a "floor" had nothing to do with state authority. And insofar as the court addressed UNEs in that context, it held that § 251(c)(3) likewise precludes the Commission from requiring incumbents to provide CLECs with "superior" quality service. *Id.*[202]

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us to decide th[e] question [of preemption of state unbundling rules] now? Sometimes it's not good, you may not like what you're asking for.").

[202] Elsewhere in the opinion, the Eighth Circuit addressed state authority to issue rules related to UNEs, but it again did not hold that states may impose unbundling requirements where the Commission has not. Instead, the court rejected the Commission's claim that state "access and interconnection" rules must be identical in every respect to the Commission's rules. *Iowa Utils. Bd.*, 120 F.3d at 806. The court held that it is "possible" for a state rule "to vary from a specific FCC regulation," without "substantially prevent[ing] the implementation of section 251." *Id.* But this possibility does not protect state rules requiring unbundling of elements for which the Commission has not found impairment or has not required unbundling — in such cases, the absence of a federal unbundling rule reflects a determination that mandated

AT&T next claims support from a "presumption that Congress did not mean to oust state law." AT&T at 188 (internal quotation marks omitted). But the Supreme Court readily disposed of any such presumption five years ago, holding that, "[w]ith regard to the matters addressed by the 1996 Act, [Congress] unquestionably has" "taken the regulation of local telecommunications competition away from the States." *Iowa Utils. Bd.*, 525 U.S. at 378 n.6. Nor are the court of appeals cases AT&T cites to the contrary. For example, the Seventh Circuit recognized that the 1996 Act preserves state authority only insofar as state "regulations promote, and do not conflict with, the stated goals and requirements of the Act on its face or as interpreted by the FCC." *Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 392 (7th Cir. 2004); *see also id.* at 395 ("observ[ing] that only in very limited circumstances, *which we cannot now imagine*, will a state be able to craft a[n] . . . unbundling requirement that will comply with the Act") (emphasis added). State commission decisions that require unbundling where the Commission has not necessarily conflict with, and prevent implementation of, the goals of the 1996 Act, both on its face and as interpreted by the Commission.

AT&T also relies on the various savings clauses in the 1996 Act. The Supreme Court has made clear that such clauses "do[] not bar the ordinary working of conflict pre-emption principles." *Geier*, 529 U.S. at 869. And the Commission has already held that all of those provisions already incorporate those principles, by making clear that state commissions have no retained authority to take actions that conflict with the requirements of the 1996 Act or the Commission's regulations, or that substantially prevent the implementation of the Act and those

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unbundling would "conflict with and 'substantially prevent' implementation of the federal regime." *Triennial Review Order* ¶ 195. Instead, state rules imposed in the context of an arbitration proceeding might lawfully vary from the Commission's rules, for example, by filling in the operational details of unbundling requirements the Commission has imposed.

rules. *See Triennial Review Order* ¶¶ 192, 194. Nothing in AT&T's comments calls any of this into question.

§ 252(e)(3). AT&T first relies on § 252(e)(3), which permits a state commission, in approving an interconnection agreement, to "establish[] or enforc[e] *other requirements* of State law," such as "requiring compliance with intrastate telecommunications service quality standards or requirements." 47 U.S.C. § 252(e)(3) (emphasis added); *see* AT&T at 190-91. But it is clear from the text of § 252(e)(3) — with its reference to "telecommunications service quality standards" — and the immediately preceding subsection, which expressly refers to the "requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251," 47 U.S.C. § 252(e)(2)(B), that the "other requirements" Congress had in mind were *not* UNE requirements.[203]

§ 251(d)(3). Next, AT&T relies on § 251(d)(3), but that section only preserves state rules that are "consistent with the requirements of this section" and that "do[] not substantially prevent implementation of the requirements of this section and the purposes of this part." 47 U.S.C. § 251(d)(3)(B)-(C). As explained above, state rules requiring unbundling where the Commission has not done so fail this test and are preempted. AT&T, however, claims that such state rules need only comply "with § 251 of the 1996 Act, *not* Commission regulations implementing it." AT&T at 192. The Commission expressly rejected AT&T's interpretation of § 251(d)(3) in the *Triennial Review Order* — holding "that Congress' reference to the 'implementation of the

[203] The only case AT&T can cite to the contrary is an unpublished, four-year-old district court decision that adopts AT&T's interpretation in a single sentence of *dicta*. *See AT&T Communications of N.J., Inc. v. Bell Atlantic-N.J., Inc.*, No. Civ. 97-CV-5762(KSH), 2000 WL 33951473, at *14 (D.N.J. June 6, 2000) (noting that "MCI and Bell [had] reached a settlement" on the issue).

requirements of this section' in section 251(d)(3)(C) means the Commission's section 251 implementing regulations," *id.* ¶ 193 n.614 — and that interpretation is correct. Section 251(d)(1), using the same terms that appear in § 251(d)(3), requires the Commission to "establish regulations to *implement the requirements of this section.*" 47 U.S.C. § 251(d)(1) (emphasis added). In § 252(c)(1), Congress defined the "requirements of section 251" to "*includ[e]* the regulations prescribed by the Commission pursuant to section 251." *Id.* § 252(c)(1) (emphasis added). The FCC's regulations, thus, are the means by which the "requirements of" § 251 are "implement[ed]." State rules that conflict with those regulations therefore "prevent implementation of the requirements" of § 251 and are preempted.[204]

§ 261(c). AT&T then relies on § 261(c), but that section, by its plain terms, anticipates the preemption of any state requirement that is "inconsistent with . . . the Commission's regulations" implementing § 251. 47 U.S.C. § 261(c); *see* AT&T at 192-93. AT&T contends that "inconsistent" is a term of art that always means "impossible," so that state unbundling rules are preempted only when complying with them would violate the 1996 Act. But AT&T is wrong. For example, the Third Circuit has held that a "state or local law is 'inconsistent' with federal requirements . . . [either] when it is not possible to comply with both, *or where state requirements are an obstacle to an execution of federal law.*" *Jersey Cent. Power & Light Co. v. Township of Lacey*, 772 F.2d 1103, 1113 (3d Cir. 1985) (emphasis added).

§ 601(c)(1). Finally, AT&T points to § 601(c), which provides that the 1996 Act "shall not be construed to modify, impair, or supersede . . . State . . . law *unless expressly so provided.*"

[204] In addition, § 251(d)(3) applies to state-imposed "obligations of local exchange carriers." 47 U.S.C. § 251(d)(3); *see* AT&T at 191-92. Thus, § 251(d)(3) preserves, as an initial matter, only those state requirements that apply generally, and in a nondiscriminatory manner, to all "local exchange carriers." UNE requirements, by contrast, apply only to incumbents.

1996 Act, § 601(c)(1) (reprinted at 47 U.S.C. § 152 note) (emphasis added); *see* AT&T at 193. But the Supreme Court has already held that the 1996 Act expressly and "unquestionably" "take[s] the regulation of local telecommunications competition away from the States." *Iowa Utils. Bd.*, 525 U.S. at 378 n.6. The savings clauses themselves, moreover, all "expressly" provide for the preemption of state commission rules that are inconsistent with or substantially prevent implementation of § 251 and the Commission's regulations. Section 601(c)(1), therefore, has no applicability here.

Finally, AT&T claims that, unless states are permitted to impose unbundling requirements where the Commission has not done so, these various clauses will have no effect. *See* AT&T at 194-95. This, too, is wrong. The savings clauses confirm that Congress has not preempted the field of intrastate telecommunications services, leaving states free to issue regulations of general applicability pertaining to intrastate services that, for example, address "telecommunications service quality standards." 47 U.S.C. § 252(e)(3).

B. State Commissions Have No Authority Under Federal or State Law To Regulate 271 Elements

1. Congress, as the Commission has recognized, granted the Commission the "*sole authority* to the Commission to administer . . . section 271" and intended that the Commission exercise "*exclusive authority* . . . over the section 271 process." *InterLATA Boundary Order*[205] ¶¶ 17-18 (emphases added); *see also SBC Communications Inc. v. FCC*, 138 F.3d 410, 416-17 (D.C. Cir. 1998) ("Congress has clearly charged the FCC, and not the State commissions," with

[205] Memorandum Opinion and Order, *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding U S West Petitions To Consolidate LATAs in Minnesota and Arizona*, 14 FCC Rcd 14392 (1999) ("*InterLATA Boundary Order*").